No. 3276.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit

Upon Appeal from the United States District Court for the District of Idaho, Northern Division.

ALRA G. FARRELL, SUBSTITUTED FOR BELDON M. DELANY,

Appellant,

vs.

EDWARD RUTLEDGE TIMBER COMPANY, A CORPORATION, AND NORTHERN PACIFIC RAILWAY COMPANY, A CORPORATION,

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REPLY BRIEF OF APPELLANT.

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The re-statement of facts by appellees has the effect of giving prominence and emphasis to the facts which are more important for the defense. The re-statement also gives opportunity for appellants to use their conclusions as to the ultimate facts, or conclusion of facts to be drawn from the record, where such conclusions are permissible, but as we shall call attention to any particular fact on which we place reliance in the course of the argument, it will not be necessary to notice appellees' statement of the facts, but we will briefly reply to a portion of the argument, replying to each article of appellees' brief under the same numeral.

I.

Appellees' contention that the appellant has failed to show that she, and her ancestor from whom she derives title, has fully complied with the requirements of the homestead laws with respect to residence, improvements and cultivation, is not well founded.

The learned trial court found that the homestead entryman, Delaney, had complied with the law, and as the appellees have taken no appeal, it does not matter that the evidence on that score is weak. Delaney was dead, and much of the best evidence of his claim died with him, but in view of the fact that the evidence of appellant was limited on the trial at the suggestion of the trial court and counsel for appellees, we think appellees are not in a position to urge this objection. (See record page 65.)

II.

Appellees start their argument under this subdivision with an attempt to shorten the distance of the land in suit from the nearest surveyed line by one-half mile, by claiming that the Railroad Company selected all of Section 20 and not merely the northeast quarter thereof, but all of Section

20 is not involved in this action, nor is the appellant concerned with any land other than the northeast quarter thereof.

The contention that the sufficiency of a description such as is involved in this action is to be determined without reference to the difficulty the settler must be under in determining the location of the land due to the lack of Government survey, supported by quotation from Miles vs. Northern Pacific Railway Company, unreported, is, in our opinion, equivalent to saying that any difficulty the settler might be under in determining the location of the land due to the lack of proper or reasonable description, could not affect the rights of the Railway Company because the Department has found that the description used by the Railway Company complied with the law. In other words the Department is not concerned with the requirement of law that the appellees shall describe the land with a reasonable degree of certainty, so as to advise intending settlers of the claims of the Railway Company, but if the language used in the description is such as is suitable for the requirements of the Department, the settler cannot complain, even though as to him it is entirely without value, because he is wholly unable to determine

therefrom what particular lands are concerned.

By adopting the theory that the purpose of these requirements of the Act under consideration was solely to aid, and for the sole use and benefit of the Department in keeping of its records, the Department has exactly reversed the Act from what Congress intended. A reading of the Act is sufficient to convince any one that Congress intended the filing of the application of the Railway Company to select public lands of the United States, to be, and to constitute in itself, an effectual notice to all intending settlers of the claim of the Railway Company. Not merely a something which might by some peculiar process with which the settler was unfamiliar be made into a notice, but a present notice. The question is not primarily one of description, but one of notice.

Counsel claim this system had become an established practice at the time appellees attempted to select and at the time of the settlement of appellant. This might be urged as an excuse for the Railway Company, and it might be said that because the Department misled the Railway Company, the appellant should suffer, which seems to us to be devoid of logic, but such is not the case. The fact is, there was no such established practice

or requirement or regulation at that time. Counsel says there were prior to 1908. We say there were none in 1901 or 1903. Our contention is sustained by the decision of Northern Pacific Railway Company vs. State of Idaho, 39 L. D. 583, cited in our opening brief, and followed in the case of Carrie E. Shearer vs. Northern Pacific Railway Company, defendant, and Edward Rutledge Timber Company, intervenor, decided March 5, 1913, unreported, but copies of which we will be pleased to file with this brief.

In the Shearer case, the Commissioner, discussing this same application of the State of Idaho, and the right of the homestead as against the attempted selection on the part of the Railway Company under the Act of March 2nd, 1899, being a case raising the identical questions raised in the case at bar, said:

> "Subsequently, instructions were requested of the Department as to the State's said application, list No. 9, with others, and the company's selections in conflict therewith, and acting under departmental instructions of March 20, 1911 (39 L. D. 583), this office, on May 8, 1911, rejected the State's application list No. 9, with others, for University purposes, as excess selections.
>
> Said departmental instructions directed this

> office, in consideration of the settlement claims, to reject such as are based upon settlement made subsequent to July 31, 1905, the date the company filed the additional list, adjusting the selection to the public survey, and stated that, as to settlements made prior to that date, if made in good faith, by a qualified homesteader, and since maintained in accordance with law, priority would be accorded, and, upon allowance of entry for lands so settled upon, the company's selections would, to that extent, stand rejected."

Appellees' argument under this sub-division, as summed up, is based on the assumption that the nearest surveyed line is seven miles distant from the land in question, and on the further assumption that the conditions are exactly the same as in the West case. The record shows, and we have heretofore stated, that the distance to the nearest surveyed line was seven and one-half miles, or more than twice the distance shown in the West case, and that it was over a wild, mountainous and heavily timbered country where the difficulty of tracing a line is probably as great as in any place that could be found, and while the number of miles may not be considered great by appellees, it is safe to say that the real obstacles and difficulties to be overcome in tracing this seven and one-half miles are as great, and it would require as much effort and expense as to trace an ordinary line seventy-

five miles. We submit that if this line was actually seventy-five miles long, no Court or Department would have the temerity to say that such a description was reasonable. The doubling of the distance in this case multiplies the difficulties, uncertainties and cost of running this line, not by two but four or more; hence any attempt to place this case in the same class as the West case must utterly fail.

III.

(1) Appellees' first contention under this head, after discussing the history of the Act of August 18, 1894, is that the Act of August 18, 1894, is in derogation of the common right to appropriate public lands under other laws, and hence it must be strictly construed and strict performance required of those steps upon which its operation is conditioned.

A casual comparison of the Act of August 18, 1894, with the Act of March 2, 1899, is enough to convince any one that the rule stated in the foregoing contention is just as applicable to the provisions of the Act of March 2, 1899, under which appellees claim title, as it is to the Act of August 18, 1894. We can see no difference in the Acts in this respect. If this rule of construction is applied to the Act of March 2, 1899, then appellant must

prevail, for the reason that it was evidently the intention of Congress in passing the Act of March 2, 1899, to provide for notice to settlers entering the unsurveyed public lands with the intention of establishing a home thereon and thereafter entering the same under the homestead laws of the United States. While we find no fault with the rule of construction claimed, we do think that it ought to be applied wherever it is applicable.

We cannot agree with appellees' statement of the record with respect to the application of the State of Idaho for survey, wherein on page .... of their brief they say:

> "Passing upon the application for survey in the light of these facts, the Commissioner, on July 19, 1901, held that the application in question was excessive and improvident, and declined to recognize or allow it. Due notice of this action was given to representatives of the State, but no appeal from the decision was taken. It has since been established that the action of the Commissioner was within the authority vested in him by law; that his order was subject to appeal under the rules and practice of the Land Department, and if erroneous could have been corrected on appeal; and that whether erroneous or not, the order became final and conclusive upon the lapse of the prescribed period without appeal."

The only thing in the record pertaining to this

matter is a letter from the Commissioner of the General Land Office to the United States Surveyor General of Idaho, in which he requests the Surveyor General of the State to procure a report from the Governor of the State of Idaho as to whether or not the State could not satisfy its grant out of lands already reserved. In which letter the Commissioner expressly states that "Pending the receipt of the report of the Governor *no action will be taken* in the matter of withdrawing from further disposal the lands," etc. (See record pages 81-82.)

It is true that the Commissioner on July 16, 1914, or thirteen years later, says in rejecting the State's application:

> "That on July 19, 1901, the Commissioner refused to withdraw the townships in question upon the ground that the areas embraced in previous withdrawals were sufficient to enable the State to satisfy its several grants."

It is this loose handling of old records by the Commissioner of which we complain. Can the Commisisoner, by merely asserting the fact, make black really white, or is it perhaps camouflage that sometimes deceives? Is it any wonder that the Court is asked to review a record which discloses such gross carelessness in the handling of facts? (See record pages 86 to 97.) In this connection

we desire to call the Court's attention to the fact that in this very decision of the Commissioner, and on page 81 of the records, he says:

> "It was held that pending the receipt of a report from the Governor, no further action would be taken on the application for withdrawal," etc.

And again on page 92 of the record he quotes from a decision of the department, holding:

> "That the withdrawal for the benefit of the State did not attach until July 15, 1901, the date the application was received in this office (G. L. O.), and was not a bar to the reservation of the lands for forestry purposes," etc.

This statement of the Commissioner is also made in the face of the further fact that the lands in question were actually withdrawn under date of January 20, 1905, after the State had deposited the necessary cost of survey. (See record pages 131-2.)

It is this statement which seems to have misled the trial court, and a careful reading of his opinion will show but for this statement in the record the learned trial court would have reached a different conclusion.

(3) In this sub-division of their brief counsel for appellees contend that:

> "If there was no valid application for survey, there was no reservation or withdrawal of the lands, under any possible construction of the Act of 1894. It is only upon the theory that the land was reserved or withdrawn as the result of an application for survey, effective before selection by the Railway Company on July 23, 1901, that the validity of that selection can be questioned."

This, of course, is exactly the contra of the position taken by appellant in her opening brief, and based upon such eminent authority as various Federal Courts, including the Supreme Court of the United States, while appellees' contention is supported by citations from the Land Department only, but it is more convenient to reply to this contention under and in connection with sub-division 10.

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(4) Under this sub-division of appellees' brief they adopt as the settled and conclusive record in this case, the statement of the record which they have theretofore, and in the opening of their brief, "constructed," which in its final analysis is a conclusion of fact. Of course if they are permitted to use this statement as the record in the case, it

would harmonize with their argument. We refer more especially to the statement of appellees contained in the second paragraph under this head, with reference to the assumption of the trial court that the Department rejected and disallowed the application for survey. We contend that the record shows that no such action was taken, as it was not taken at the time. The reference in a ruling of the Department thirteen years later contrary to the record does not change the fact. Hence all of the argument of appellees with respect to the jurisdiction of the Commissioner, and this ruling of the Commissioner becoming final by reason of no appeal being taken, is, in our opinion, entirely beside the question, and has no foundation of fact upon which it can rest.

Counsel seem to lay great stress and put great store on the statement that while the earlier decisions held the application of the State to be valid and binding, it was subsequently found that these decisions were due, "partly to failure to give due consideration to the facts surrounding the application for survey, and partly to an erroneous view of the functions and authority of the Commissioner in proceedings under the Act of 1894." While the facts really are that the later decisions

referred to by counsel, and the decisions which did give due consideration to the "functions and authority of the Commissioner in proceedings under the Act of August 18, 1894," were all rendered and made after the State of Idaho had no longer any interest whatsoever in this application, and after the State had selected the full quantity of land which it was entitled to select. Then the Commissioner of the General Land Office, by reading into the record as of a date thirteen years prior thereto, made this wonderful discovery, that his predecessor in office had failed to give "due consideration to the facts surrounding the application for survey."

(6) We feel grateful to counsel for appellees for the argument under this head as to the proper rule of statutory construction thought to be applicable under the provisions of the Act of August 18, 1894. Applying this rule, and the reasons for the rule so ably stated, to the Act of March 2, 1899, we believe the Court will be irresistibly drawn to the conclusion that it was the intention and purpose of Congress to provide such notice as should be actual notice to intending settlers upon the public domain of any rights which the Railway Company might seek to initiate under this Act.

The argument is all made for the purpose of taking out of the Act of August 18, 1894, that clause which reads as follows:

> "And the lands that may be found to fall within the limits of such township or townships, as ascertained by the survey shall be reserved upon the filing of the application for survey from any adverse appropriation by settlement or otherwise."

If this clause was eliminated from the statute the statute would have absolutely no force or effect. This argument is advanced evidently for the reason that if this clause can be modified by proper construction then it may be deprived of its self-executing power, and the reservation be construed to take effect only when the Commissioner of the General Land Office says it is reserved.

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(8) The contention that certain rights have become vested upon the erroneous practice of the Land Department can only apply to the Railway Company and the Timber Company. The fallacy of this argument lies in the fact that it assumes that the rights of these Companies were initiated under such practice as they contend for. But we have shown that they were not so initiated.

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(9) Counsel have not caught the point sought to be made by appellants in citing the Donahue case. That case established the rule that where any claim has attached to land at the time the Railway Company attempted to select that no matter if it is thereafter released, relinquished or abandoned, the land becomes again a part of the public domain of the United States, but was not subject to entry by the Railway Company.

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(10) Counsel attempt to distinguish the application of the State of Idaho for survey, from all other methods or attempts to appropriate public lands, and claim that this particular method of appropriation does not initiate a claim to the land, and hence does not except these lands from lands which the appellees were entitled to enter. In other words, they claim that the appellees might file their application to select this land subject to the prior and superior rights of the State to appropriate it. This is contrary to the view expressed by the Courts in numerous cases.

In the case of McIntyre vs. Roeschlaub, 37 Fed. 556, cited in our opening brief, a homestead entry was made on the land in question by one who was an alien and not entitled to enter any land under

the homestead laws. The successor of the Railway Company in that case contended that the attempt to enter the land under the homestead laws having been made by an alien it was void, and therefore no right or claim attached to the land. In disposing of that question, the Court said:

> "Within the reasoning of that case, I think the contention of the complainants cannot be sustained. So far as the records of the land-office disclose, a proper homestead entry had attached. The Government had accepted the filing of the entry by Mary Hooper. Whether it should afterwards permit that entry to ripen into a perfect title, or should challenge her right to perfect the entry, were matters resting solely in the discretion of the government. The right to inquire into the validity of the proceedings in the land-office, regular in form, was not granted to the railroad company. Such right of inquiry remained personal to the Government. It occupied the position, not of a vendor, but of a donor. It limited its gifts to lands to which a homestead right had not attached. Whenever it accepted a homestead entry, its acceptance removed the land from the terms of the grant. What should become of the matter thereafter as between the person making the entry and the Government was a matter that did not affect the railway company. It had no right to inquire. The Government might have waived all the informalities and defects in the person, or in the occupation, and issued its patent. Whether it did or did not was a matter of which the railroad company could not complain. It was

> enough for it, that upon the face of the records there was an apparently valid homestead entry, one which the Government recognized, and one which it might finally permit to ripen into a perfect title. The homestead claim, whether good or bad, in the language of the act, '*attached*'; and that is all the railroad company could inquire into. That being settled, the land did not pass under this grant."

McIntyre vs. Roeschlaub, 37 Fed. 556.

In case of Southern Pac. Railroad Company vs. Brown, 75 Fed. 85, cited in our opening brief, the land was found by the Government survey to be within the limits of a Mexican grant, and thereafter in a proceeding pending at the time of the congressional grant, the land was found to be not within the limits of the Mexican grant, and that the holder of the Mexican grant had no right whatsoever to it.

In disposing of that case, the Court said:

> "Not only that, but a survey had been made under the authority of the government which included the land within the limits of the Jurupa. These facts excluded the land from the grant made to the railroad company, and it is not permitted to maintain its suit upon the ground that it was finally determined that the contention of the claimants to the Jurupa was not well founded; for, as before stated, *it is not the validity of such claim, but the fact that it was made, that excluded the lands in*

controversy from the category of public lands, within the meaning of that term as used in all the railroad land grants. This general and controlling principle has been so frequently decided by this court and by the Supreme Court of the United States that a bare statement of the facts is sufficient to show that the lands were *sub judice,* and did not pass to appellant by reason of any of the provisions of the act of March 3, 1871. Amacker v. Railroad Co., 7 C. C. A. 518, 58 Fed. 851; Railroad Co. v. Maclay, 9 C. C. A. 609, 61 Fed. 554; Newhall v. Sanger, 92 U. S. 761; Railway Co. v. Dunmeyer, 113 U. S. 629, 5 Sup. Ct. 566; Doolan v. Carr, 125 U. S. 618, 8 Sup. Ct. 1228; Railroad Co. v. Whitney, 132 U. S. 357, 10 Sup. Ct. 112; Land Co. v. Griffey, 143 U. S. 32, 41, 12 Sup. Ct. 362; Bardon v. Railroad Co., 145 U. S. 535, 12 Sup. Ct. 856; Whitney vs. Taylor, 158 U. S. 85, 15 Sup. Ct. 796."

Southern Pac. R. Co., v. Brown, 75 Fed. 85. "The location of a tract of public land by an alleged beneficiary under the seventh clause of the second article of the treaty of September 30, 1854 (10 Stat. 1109), between the United States and the Chippewa Indians of Lake Superior, *segregates the tract from the public domain* and appropriates it to private use.

While such a location remains in force, Porterfield warrants issued under the act of April 11, 1860 (12 Stat. 836), cannot be lawfully located on the same land because that land has been otherwise appropriated by the prior location whether right or wrong." (*Syllabi.*)

Hartment v. Warren, 76 Fed. 157.

The contention of the holder of the Porterfield warrants was that the "alleged beneficiary" was not a member of the Chippewa tribe, and hence had no capacity to take under the law.

> "The entry of public land under the laws of the United States, whether legal or illegal, segregates it from the public domain, appropriates it to private use, and withdraws it from subsequent entry or acquisition until the prior entry is officially canceled or removed."
>
> *James v. Germania Iron Co.*, 107 Fed. 597.

In the case of Newhall v. Sanger, reported in 92 U. S. 761, the Supreme Court, in discussing the Act of July 1, 1862, being the Act granting every alternate section of public land, etc., said:

> "We held that they attached only to so much of our national domain as might be sold or otherwise disposed of, and that they did not embrace tracts reserved by competent authority for any purpose or in any manner, although no exception of them was made in the grants themselves. Our decision confined a grant of every alternate section of "land" to such whereto the complete title was absolutely vested in the United States. The acts which govern this case are more explicit, and leave less room for construction. *The words, 'public lands," are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws.* That they were so employed in this instance is evi-

> dent from the fact that to them alone could, on the location of the road, the order withdrawing lands from preemption, private entry and sale, apply."

In this case the Court found that thes lands were *sub judice* at the time of the passing of the Act, and consequently the use of the words, "public lands," the lands not being at that particular moment open for selection, were not considered public lands within the meaning of the Act.

In the case of Leavenworth L. & G. R. R. Co. vs. United States, 92 U. S. 733, in discussing a claim made under a railroad grant to lands, the absolute title in fee of which belonged to the United States, but to which the Osage Indians had a right of occupancy, the Supreme Court said:

> "And such grants could be treated in no other way, for Congress cannot be supposed to have thereby intended to include lands previously appropriated to another purpose, unless there be an express declaration to that effect. A special exception of them was not necessary, because the policy which dictated the grants confined them to lands which Congress could rightfully bestow, without disturbing existing relations and producing vexatious conflicts. The legislation which reserved them for any purpose excluded them from disposal in the manner that the public lands are usually disposed of, and this Act discloses no intention

> to change the long continued practice with respect to lands set apart for the use of the Government or of the Indians. As the attempted transfer of any part of an Indian reservation, secured by treaty would also involve a gross breach of the public faith, the presumption is conclusive that Congress never meant to grant it.
>
> 'A thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers.' 1 Bac. Abr. 247. The Treaty of 1825, secured as to the Osages the possession and use of their lands so long as they may choose to occupy the same and this Treaty was only the substitute for one of an earlier date with equal guaranties."

In case of Northern Pacific Railway Company vs. Musser-Sauntry Land, Logging & Mfg. Co., 168 U. S. 607, the Supreme Court of the United States in discussing the affect of a reservation of certain public lands by the Secretary of the Interior, which reservation was made for the purpose of enabling the Railway Company to select its lieu lands therefrom, said (which we submit is identical to the case at bar, where the lands were reserved that the State of Idaho might select therefrom such lands as it was entitled to):

> "But beyond the significance of the word 'reserved,' alone, there are other words in the act which, taken in connection with it, make it clear that these lands do not fall within the grant. 'Otherwise appropriated' is one term

of description, and evidently when the withdrawal was made in 1866 it was an appropriation of these lands so far as might be necessary for satisfying that particular grant. It is true it was not a final appropriation or an absolute passage of title to the state or the railway company, for that was contingent upon things thereafter to happen, first, the construction of the road, and, second, the necessity of resorting to those lands for supplying deficiencies in the lands in place; still it was an appropriation for the purpose of supplying any such deficiencies. Again, in the description, are the words, 'free from preemption or other claims or rights.' Certainly, after this withdrawal, the Wisconsin Company had the right, if its necessities required by reason of a failure of lands in place, to come into the indemnity limits and select these lands. Can it be said that they were free from such right when the very purpose of the withdrawal was to make possible the exercise of the right? But the language is not simply 'free from rights,' but 'free from claims,' and surely the defendant railway company had an existing claim. No one can read this entire description without being impressed with the fact that Congress meant that only such lands should pass to the Northern Pacific as were public lands in the fullest sense of the term, and free from all reservations and appropriations and all rights or claims in behalf of any individual or corporation at the time of the definite location of its road. Northern Pacific Railroad Company v. Sanders, 166 U. S. 620 (41:1139). And such is the general rule in respect to railroad land grants."

The doctrine of the foregoing cases has been reviewed and applied in case of Northern Lumber Company vs. O'Brien, 139 Fed. 614, to a withdrawal made for the purpose of enabling the Northern Pacific Railroad Company to select lieu lands for the purpose of satisfying its grant. This case is also identical with the case at bar. The numerous authorities cited in that case makes it unnecessary for us to cite further authorities here. In that case the Court said:

> "The grant to the Northern Pacific Railroad Company was one in praesenti and was in terms confined to 'public land.' St. Paul & Pacific R. R. Co. v. Northern Pacific R. R. Co., 139 U. S. 1, 5, 11 Sup. Ct. 389, 35 L. Ed. 77. Land not public at the date of the grant was not granted, even though it subsequently became of that character. Bardon v. Northern Pacific R. R. Co., 145 U. S. 535, 539, 12 Sup. Ct. 856, 36 L. Ed. 806; Northern Pacific Ry. Co. v. DeLacey, 174 U. S. 622, 626, 19 Sup. Ct. 791, 43 L. Ed. 1111; United States v. Southern Pacific R. R. Co., 146 U. S. 570, 594, 606, 13 Sup. Ct. 152, 36 L. Ed. 1091. The words 'public land' have long had a settled meaning in the legislation of Congress, and when a different intention is not clearly expressed, are used to designate such land as is subject to sale or other disposal under general laws, but not such as is reserved by competent authority for any purpose or in any manner, although no exception of it is made. Bardon v. Northern

Pacific R. R. Co., supra; Wilcox v. McConnell, 13 Pet. 498, 513, 10 L. Ed. 264; Leavenworth, etc. R. R. v. United States, 92 U. S. 733, 741, 745, 23 L. Ed. 634; Newhall vs. Sanger, 92 U. S. 761, 23 L. Ed. 769; Doolan v. Carr, 125 U. S. 618, 630, 8 Sup. Ct. 1228, 31 L. Ed. 844; Cameron v. United States, 148 U. S. 301, 309, 13 Sup. Ct. 595, 37 L. Ed. 459; Mann v. Tacoma Land Co., 153 U. S. 273, 284, 14 Sup. Ct. 820, 38 L. Ed. 714; Barker v. Harvey, 181 U. S. 481, 490, 21 Sup. Ct. 690, 45 L. Ed. 963; Scott v. Carew, 196 U. S. 100, 109, 25 Sup. Ct. 193, 49 L. Ed. 403. From the time of the earliest railroad land grants it was the practice of the chief officers of the Land Department, to whom was committed the administration of such grants, to withdraw from settlement, entry and sale the public lands along the line or route of the road so aided, in advance of its definite location, in order that the lands might be preserved for the ultimate satisfaction of the grant. *Such withdrawals, where not made in opposition to the terms of the grant or other congressional enactment, have been uniformly declared to be reservations made by competent authority and to be efficient to remove the lands therein from the category of public land and to exclude them from subsequent railroad land grants containing no clear declaration of an intention to include them; and this, even though it subsequently transpired that the withdrawal was ill-advised, or that the lands therein were not required for the satisfaction of the grant.* Wolcott v. Des Moines Company, 5 Wall. 681, 688, 18 L. Ed. 689; Riley v. Welles, 154 U. S. 578, 14 Sup. Ct. 1166, 19 L. Ed. 648; Wolsey v. Chapman, 101 U. S. 755, 768, 25 L. Ed. 915;

> Wisconsin Central R. R. Co. v. Forsythe, 159 U. S. 46, 54, 55, 15 Sup. Ct. 1020, 40 L. Ed. 71; Spencer v. McDougal, 159 U. S. 62, 15 Sup. Ct. 1026, 40 L. Ed. 76; Northern Pacific R. R. Co. v. Musser-Sauntry Co., 168 U. S. 604, 607, 18 Sup. Ct. 205, 42 L. Ed. 596."

Before passing this subject, however, we cannot refrain from calling the Court's attention to a decision of this Court which we consider directly in point. We refer to the case of Northern Pacific Railway Company vs. Wismer, 230 Fed. 591, which is a contest between the Railway Company claiming under its grant, Act of July 2, 1864, and the defendant claiming through the Indian title growing out of an occupancy of these lands by a Nomadic tribe of Indians at the time the Railway definitely fixed its line of railroad, and filed a plat thereof in the office of the Commissioner of the General Land Office. The facts bring the reason and application of the rule within the case at bar. In that case the Court said:

> "It is useless to cite the numerous other decisions of the Supreme and other courts to the same effect. Nor is it at all material that the outstanding claim be valid; for the Supreme Court, as well as other courts, have frequently decided that it is not the validity of such claim but the fact that it existed at the time of the definite location of the railroad, that excluded

> the lands in controversy from the category of 'public lands' to which alone the company's grant attached. Decisions to that effect are also very numerous. See among them, Newhall v. Sanger, 92 U. S. 761, 765, 23 L. Ed 769; United States v. So. Pac. R. R. 146, U. S. 570, 606, 13 Sup. Ct. 152, 36 L. Ed. 1091; United States v. So. Pac. R. R. Co. (C. C.), 76 Fed. 134, and cases supra."

Under this sub-division of their brief appellees concede the rule of the Donahue case to be as we have heretofore stated it but rely on the "fallacy of the doctrine" as exposed in the opinion of the trial court, namely, the failure to distinguish between the "blanket application," as the application of the State for survey is called, and a specific claim to appropriate particular lands in which class they place their application to select.

This doctrine has been repudiated by the Supreme Court of the United States in case of Musser-Sauntry L. L. & Mfg. Co., *supra*, in which case the lands were withdrawn from appropriation solely for the purpose of enabling the Railway Company to select a *portion of these lands* if its necessities required by reason of a failure of land in place. In other words, there was a possibility that the Railway Company might need some of these lands. They were not making a claim to any one tract

more than another, and were never intending to appropriate all of these lands. The Supreme Court has expressly held that this was an existing "*claim*" against this land. To previous contentions appellees add the further proposition that, under the rule of decision of the Land Department, an application in order to have segregative effect must be "*recognized or allowed.*" Well, the State's claim was accepted and recognized, and it was not disallowed until thirteen years later, and after the State had satisfied its grant, and the early decisions of the Department were to the effect that the claim of the State was superior to that of the Railway, but it will surely not be contended that this rule goes so far as to give the Department the right to reject a valid claim and award the lands to one not entitled to them, and as we stated in our opening brief, the right to determine whether there was a necessity for the withdrawal of these lands to enable the State to satisfy its grant, was by Congress reposed in the Governor of the State of Idaho, and the statutes under consideration says: "And the lands which may be found to fall within the limits of such township or townships as ascertained by the survey *shall* be reserved upon the filing of the application for

survey *from any adverse appropriation by settlement or otherwise,"* etc. Here the statute withdraws the land without any action on the part of the Land Department. The statute is mandatory.

(11) The record in this case shows that, but for the claim of the Railway Company, these lands would have been patented to Delaney. The decisions of the various officers of the Land Department in effect so state. (See record pages 93-96-97.)

The patent issued to the Railway Company is void for the reason that the lands involved not being of the class of lands granted, the officers of the Land Department were without jurisdiction to award the patent, as shown by the authorities cited in our opening brief. Under this state of the record the authorities cited by appellees under section 11 do not apply.

But appellees have contended that the Land Department was acting within the law in receiving and holding the application of the Railway Company to select "subject to the superior right of the State." Is it proper for them to ask to have this rule applied to them, and at the same time deny the rule if it protects the appellant?

The rule here cited by appellees to the effect

that while an "entry of land" remains of record and uncancelled on the records of the Land Office no rights can be recognized or secured by a subsequent application to enter the lands, is based upon the Act of May 14, 1880, 21 Stat. at L. 140, Chapter 89 U. S. Comp. St. 1901, page 1392. Counsel have enlarged considerably upon the language of this statute.

This statute is for the protection of the successful contestant in contest cases only, and this statute and the rule of the Department promulgated under it, simply provide that the Department will refuse to recognize any application by a third party for the land involved in the contest until the record is clear of all former entries, for the purpose of carrying out this statute and securing to the successful contestant a preference right of entry, and this is all that is decided in case of Holt vs. Murphy, 207 U. S. 407, 52 L. Ed. 271, cited by appellees at the head of their long list of cases under this sub-division. The Holt case is a contest case and during the pendency of the appeal the entryman relinquished in favor of a third party after a decision that neither contestant was entitled to the land.

Deofield v. Otterson, 37 L.D. 65
Dowlby vs. Hays, 34 L.D. 370
Decided Jan.10,1906.

In McMichael vs. Murphy, 197 U. S. 304, 49 L. Ed. 767, also cited by appellees, the Court simply held that no settlement right could be acquired as against a *contestant* during the life of a *contest*, and that a relinquishment of the rights of the entryman induced by the contest conferred a superior right of entry as against any rights attained by the settlement of the contestant.

In Hodges vs. Colcord, 193 U. S. 192, 48 L. Ed. 677, the facts are identical with those in case of McMichael vs. Murphy, and decision of the Court announces no other or different principle, and so far as we have been able to find there is not a decision of any court cited in which a contrary rule of decision is announced.

In case of Weyerhauser vs. Hoyt, 219 U. S. 392, cited by appellees, 55 L. Ed. 258, the Supreme Court discussed the case of Sjoli vs. Dreschel, 199 U. S. 564, 50 L. Ed. 311, and in commenting on that case said:

> "The Sjoli controversy, succinctly stated, thus arose: A homestead settler went in 1884 upon land within the indemnity limits of the grant to the Northern Pacific Railroad Company. He erected a dwelling house and moved into it with his family and cultivated a portion of the land, all prior to the filing in 1885 of a

list of selections by the railroad company, embracing the tract settled upon by Sjoli. Although the settler had thus, prior to the filing of the list of selections, entered upon and improved the land with the intention of perfecting title under the homestead laws, his application to enter, for reasons which need not be here adverted to, was not made until subsequent to the filing by the railroad company of its list of selections. Relying upon this fact, the railroad company opposed the application of Sjoli, and required the Department to determine whether the railroad company, by the filing of its list of selections, could deprive the settler Sjoli of his rights, despite the fact that his settlement and improvement of the land had occurred prior to the filing by the company of its list of selections. The Land Department decided in favor of the settler, and a patent was issued to him.

The matter decided by this court in the Sjoli case arose from the bringing of a suit by Dreschel, as assignee of the rights of the railroad company, asserting that Sjoli held the land in trust for him as the grantee of the railway company, because the Land Department had, as a matter of law, erred in deciding that the rights of the settler, Sjoli, were paramount to the subsequent selection by the railroad company, since, at the time of the filing of such list of selections, no record evidence existed in the Land Department of the asserted settlement by Sjoli, or of his intention to avail of the benefit of the homestead laws. The action of the Land Department in maintaining the paramount right of the settler was sustained."

In the case at bar Delany for a period of about twelve years was engaged in a contest with the State of Idaho, and the rights of the Railway Company were not mentioned in this contest, and his homestead application was rejected for conflict with the selection of the State of Idaho. After the State's application had been rejected and on July 9, 1915, the Commissioner of the General Land Office on appeal rejected Delany's homestead application on the ground, among others, that the land was duly selected by the Railway Company prior to the date of the alleged settlement and date of filing the application of the homestead entryman. No question was raised at any stage of the proceedings in the Land Department as to the method of procedure adopted by the parties. The Land Department attempted to determine the rights of various parties as though the matter were a contest as to the rights of all the parties and as between the Northern Pacific Railway Company and Delany as their rights existed after the application of the State of Idaho had been rejected. Its decision is directly contrary to the decision of the Supreme Court in case of Sjoli vs. Dreschel, *supra*, where the application of the homestead entryman was made subsequent to the filing of the lieu selec-

tion list by the Railway Company. If, as a matter of fact, at the time of the decision of the contest between Delany and the Railway Company, the Railway Company had no right to the land under the established rule of the Land Department then existing, the application of Delaney should have been accepted because he was then contesting the rights of the Railway Company.

The rules of the Land Department with respect to the initiation of a contest, are merely rules of practice governing the procedure as to the bringing of the controversy within the jurisdiction of the Department. If the Department assumes jurisdiction of the controversy without requiring compliance with any of the rules of practice with respect thereto, such rules are waived, and the prevailing party cannot complain that the Department was without jurisdiction to determine the controversy and at the same time accept the benefits of its decisions.

In any event, it was clearly the duty of the Department to have cancelled the selection of the Railway Company at the time of the hearing of the contest between Delaney and the Railway Company and as Delaney was then keeping his tender of his application before the Department by his

appeal, to have then accepted his application as of that date. It matters not what angle we view the controversy from, it is still apparent that had the claim of the Railway Company been rejected as it should have been the land would have been patented to Delaney.

Delaney resided and made his home upon this land for twelve years and until the time of his death. He made many improvements thereon of more than $3000.00 in value. There can be no question of his good faith.

In the case of Lake Superior Ship Canal R. & I. Co. vs. Cunningham, 155 U. S. 384, 39 L. Ed. 193, cited in our opening brief, the Supreme Court sustained a settlement on lands within a railroad grant, made while the lands were reserved from entry.

Some confusion has arisen in decisions of the Department by a failure to distinguish between an application to enter lands where the right to consider and accept such application is within the jurisdiction of the Land Department and applications which the Department is without jurisdiction to receive because Congress has by law provided that such applications will confer no rights, *e. g.*, the lands in the case at bar were not of the class

which the Railway Company was entitled to select at the time of the attempted selection, because not free from claim. Any action by the Department on such an application, tending to confer any right on the applicant is wholly void, and the lands still in fact remain public lands for the action of the Department, being void *ab initio*, cannot deprive any one of any legal right he might have, such as the right to enter the land covered by such application.

There is a clear distinction between such a case and a case where the Department has jurisdiction to receive and determine the legality of the applications, for a mistake or error of the Department in the latter case would be voidable only and the Department would be acting within reason in requiring its records to be cleared before considering further applications covering the same land.

In the one case the Department erred in attempting to act at all. In the other it erred in attempt to discharge a duty which it might lawfully discharge. This confusion is further augmented by the fact that under the Railroad grants and Acts such as the one under which appellees claim even a void attempt to enter excludes the lands from the category of lands which they may select.

When the authorities cited by appellees under this sub-division of their brief are carefully examined and weighed in the light of this principle, nothing will be found to sustain their contention that while the Railroad Comapny in fact had no right to select the lands in controversy, yet because they selected them before Delany settled upon them, they must be permitted to retain them.

Their unlawful selection ripens into a perfect title in the face of twelve long years of litigation in the Land Department and the Courts.

It seems to us that this doctrine is so far from equity that it ought not to be considered seriously in a court of equity, especially in view of the well established rule of decision that "legislation respecting Public Lands is to be construed favorably to the actual settler."

We therefore most respectfully submit that the decree of the trial court should be reversed.

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